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No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

—v.—

HYDROLEVEL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Preliminary Statement

ASME respectfully submits this Reply Brief in response to the brief of respondent Hydrolevel Corporation and to the *amicus* brief filed on behalf of the United States.

The issue before this Court is whether an organization can become part of an antitrust conspiracy based solely on the disloyal acts of two volunteer members who had no intent to benefit it. ASME's brief demonstrated that the holding of the Court of Appeals was not supported by any antitrust precedent and was refuted by virtually every decision or comment that has addressed the issues presented. The briefs of Hydrolevel and the Government do not focus on this question, nor do they adduce a single decision that rebuts our showing. Instead, both

assiduously avoid supporting—or even addressing—the appellate panel's decision, and instead rely upon a hodge-podge of agency concepts that frequently are erroneously stated, and in any event have nothing to do with the Questions Presented in this case. As this brief will demonstrate, however, the exceptional principle of "apparent authority" without any requirement that the agent intend to benefit the principal, which was the exclusive basis for the panel's affirmance of the District Court's judgment, has never been and should not be used as a basis for antitrust liability.

ARGUMENT

POINT I

AN ORGANIZATION SHOULD NOT BE HELD STRICTLY LIABLE UNDER THE ANTITRUST LAWS BASED SOLELY ON THE ACTS OF DISLOYAL AGENTS WHO DID NOT INTEND TO BENEFIT THE ORGANIZATION

Most of the arguments presented by Hydrolevel and the Government are addressed to issues that the Court of Appeals did not decide, and are thus not before this Court.

The issue before the Court of Appeals was the sufficiency of the evidence that ASME was an active and knowing member of an antitrust conspiracy. ASME argued that there was no evidence of "a unity of purpose" or a "common design and understanding" among ASME and its alleged conspirators, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946), or that ASME engaged in "joint and collaborative action," *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966); *see also Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). As set forth in greater detail in our main brief, *see* ASME Br. 39 at n., the federal courts have regularly reversed jury verdicts or affirmed dismissals of antitrust complaints where there was no showing of

a "deliberate and intentional combination." *See, e.g., International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 241 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). In order to prevail on appeal, Hydrolevel had to show record evidence that ASME knew of at least some of the illicit goals of the alleged conspiracy and intended to participate in it.

The only basis upon which Hydrolevel could conceivably argue that ASME had contemporaneous knowledge of and intended to participate in anticompetitive activity was the theory that James' and Hardin's knowledge of their own acts and their intent to benefit their true corporate principals, M&M/ITT and Hartford, should automatically be imputed to ASME and should thus constitute a "unity of purpose" between ASME and the other defendants. For the reasons set forth in the margin, Hydrolevel's claim in this Court that the activities of staff secretary W.B. Hoyt independently demonstrate ASME's complicity, *see* H. Br. 7, 13,* is absurd and was not seriously argued in the Court of Appeals.**

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* In addition to the abbreviations heretofore used, *see* ASME Br. 2 at n., "H. Br." refers to Hydrolevel's brief in this Court, and "Gov't Br." refers to the brief of the Solicitor General.

** As staff secretary of the B-PV Committee, Hoyt performed the ministerial function of receiving written inquiries and, under the circumstances in this case, *see* ASME Br. 6, directing them to the proper subcommittee chairman and then issuing the subcommittee chairman's "advice" in his name. The evidence at trial was unequivocal that he had no knowledge of the low-water fuel cut-off market, and was not in a position to appreciate, let alone join in, the anticompetitive acts of M&M/ITT or Hartford. App. 864. While Hydrolevel coyly states that there was "conflicting evidence at trial" as to whether Hoyt handled the M&M inquiry in a deliberately irregular manner, *see* H. Br. 7, the record demonstrates that Hoyt followed regular and written procedures in directing the M&M inquiry—one of literally thousands that passed through his hands each month—to the attention of the relevant committee or subcommittee chairman. ASME Br. 5-8. Hydrolevel's surmise that Hoyt's mechanical acts "justified the inference that Hoyt was aware of the scheme concocted by James and Hardin," H. Br. 7, has no support in the record. The panel did not rely on or even mention Mr. Hoyt's actions as a basis for affirming the liability judgment.

In support of its judgment, Hydrolevel argued in the Court of Appeals two theories of vicarious liability, both of which the Court of Appeals expressly declined to reach. A-12, A-13. First, Hydrolevel argued that the acts of James and Hardin should be imputed to ASME under a theory of "actual authority." Second, Hydrolevel argued that even if ASME did not contemporaneously know of or participate in James' or Hardin's acts, it subsequently ratified them. Hydrolevel never argued that ASME would be liable for acts of its agents within the scope of their "apparent authority" and, indeed, the theory of apparent authority was not briefed by either party in the Court of Appeals.

Instead of reaching either of the two theories argued by the parties, the panel held that the question whether ASME knowingly and intentionally participated in a conspiracy should be governed by agency principles of "apparent authority." While acknowledging that "the appropriate theory for conventional torts" requires a showing that the agent intended to benefit the principal's interest, A-13, the panel held that this requirement is not necessary in antitrust cases, and thus that ASME's "unity of purpose" and "common design and understanding" could be based exclusively on the acts of disloyal volunteer members who had no thought of benefiting ASME. The principal issue presented by this appeal is whether the Court of Appeals erred in its legal conclusion that ASME could be deemed part of an antitrust conspiracy—and thus be liable for three times the damages caused by all of ASME's alleged conspirators—solely because two of its 90,000 members, even though not intending to benefit ASME at all, were outwardly acting within the scope of their "apparent authority." If the panel's reasoning was erroneous, at a minimum the decision must be reversed and the case remanded for reconsideration under the proper standard. As this brief will demonstrate, the briefs of Hydrolevel and the Solicitor General avoid rather than refute ASME's showing that the panel's holding is totally unsupported by precedent, is inconsistent with antitrust principles, and is simply bad policy.

A. An Agent's Intent to Benefit His Principal Is Required To Impute the Agent's Knowledge and Intent to the Principal; the Panel's "Apparent Authority" Standard Should Not Govern Antitrust Suits.

Even though the principal issue before the Court is the correctness of the panel's holding that ASME could be found liable for participating in an antitrust conspiracy based solely on the acts of agents who did not intend to benefit it, both Hydrolevel and the Government give scant attention to the point. Virtually ignoring the holding of the Court of Appeals, they focus instead on theories that the Court of Appeals formally did not reach or implicitly rejected.*

T' hearted support given to the panel's holding is at : anpersuasive. First, Hydrolevel claims that *United Mine Workers of America* v. *Coronado Coal Company*, 259 U.S. 344 (1922), somehow "implied" that an organization may be shown to be part of an antitrust conspiracy based on the acts of its agents within the scope of their "apparent authority." As even Hydrolevel is forced to admit, *see* H. Br. 37, n.30, the only antitrust case interpreting the *Coronado Coal* decisions has held that an apparent authority rationale cannot

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* The Government not only discusses the panel's holding only in a small portion of its brief, *see* Gov't Br. 21-25, but also attempts to shield the panel's holding by claiming, in its Point I, that ASME should not be allowed to seek review of the panel's opinion since it did not object to the jury charge. The accuracy of the instructions to the jury—the only substantive issue that the Government even addresses—is not an issue in this Court. ASME's argument in the Court of Appeals was that there was insufficient evidence—indeed, no evidence—showing that ASME intentionally and knowingly participated in an antitrust conspiracy. That is an issue of sufficiency of the evidence, not a question of the jury charge. The panel resolved the sufficiency issue by declaring that the appropriate standard is an "apparent authority" principle, and that it thus did not need to find *any* evidence that James and Hardin intended to benefit ASME. If ASME is correct that the "apparent authority" theory cannot provide the exclusive basis for linking an otherwise unwitting organization to an antitrust conspiracy—an issue that is squarely raised by the Questions Presented in both ASME's petition and main brief—it follows at a minimum that the panel's opinion must be reversed and the case remanded to the Court of Appeals for a determination of the sufficiency of the evidence under the proper standard.

be used to impute a faithless agent's intent to the principal.* *See Truck Drivers' Local No. 421* v. *United States,* 128 F.2d 227, 235-36 (8th Cir. 1942). Hydrolevel's attempt to distinguish *Truck Drivers'* on the ground that the "case involved only allegations of actual authority and ratification", H. Br. 37 n.30, is simply false: the Eighth Circuit reversed the verdict against the organization based on insufficiency of the evidence tying it to an antitrust violation, squarely holding that "mere apparent agency would not be sufficient to take the matter to the jury." 128 F.2d at 235.

Second, Hydrolevel recites the panel's basis for applying an "apparent authority" rationale, citing *Gleason* v. *Seaboard Air Line Railway Co.,* 278 U.S. 349 (1929), H. Br. 37, *see also* Gov't Br. 24, without even attempting to address or refute ASME's demonstration that these principles are inapplicable to and have never been applied in an action involving punitive or treble damages. *See* ASME Br. 30-35; *United States* v. *Ridglea State Bank,* 357 F.2d 495, 499 (5th Cir. 1966); *Bankers Life Insurance Co. of Nebraska* v. *Scurlock Oil Co.,* 447 F.2d 997, 1004-05, n.12 (5th Cir. 1971); *Oman* v. *United States,* 179 F.2d 738, 741 (10th Cir. 1949); *Ruidoso Racing Ass'n, Inc.* v. *Commissioner,* 476 F.2d 502, 506 (10th Cir. 1973). *See also Lake Shore & Michigan Southern Railway Co.* v. *Prentice,* 147 U.S. 101 (1893), discussed at p. 11, *infra.*

Hydrolevel then claims that the *Gleason* rationale has been adopted "by many other federal court decisions applying the 'apparent authority' concept to find principals liable in a wide variety of federal regulatory and common law causes of action." H. Br. 37. With irrelevant exceptions,** every decision

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* Although Hydrolevel does not reveal this, the only decision upon which it relies for a contrary reading of *Coronado Coal, Mile Branch Coal Co.* v. *United Mine Workers of America,* 266 F.2d 919 (D.C. Cir. 1959), is not an antitrust case.

** *Dark* v. *United States,* 641 F.2d 805 (9th Cir. 1981), involved a tax assessment under a treasury regulation, 26 C.F.R. § 44.4401-2(a)(1), specifically making a principal liable for money received by an agent. *Izard* v. *Arndt,* 483 F. Supp. 261 (E.D. Wis. 1980), involved a suit under the federal

thereafter cited by Hydrolevel, *see* H. Br. 38, n.31, and by the Government at Gov't Br. 24, n.20, involved common law fraud claims and other types of tort liability that, as ASME already demonstrated in its main brief (ASME Br. 27-29, 30 n.), fall into the narrow category of cases appropriately governed by the principle of apparent authority. *See, e.g., National Acceptance Co. of America* v. *Coal Producers Association, Inc.*, 604 F.2d 540, 542-43 (7th Cir. 1979) ("common law fraud"); *Bowman* v. *Home Life Insurance Co. of America*, 243 F.2d 331, 333 (3rd Cir. 1957) (fraud suit; "wholly [governed by] Pennsylvania law"); *Employers' Liability Assurance Corp.* v. *L. J. Marcotte Insurance Agency*, 314 F.2d 470 (8th Cir. 1963) (fraud in handling insurance claims).

By contrast, in each of the true "federal regulatory" suits cited at ASME Br. 25-26, n. (none of which Hydrolevel successfully distinguishes) federal courts have uniformly held that an agent's acts and illicit intent will not be imputed to the principal if the agent did not intend to benefit it. *See also Rochez Brothers* v. *Rhoades*, 527 F.2d 880 (3rd Cir. 1975), which held in a suit under § 20(a) of the Securities Exchange Act of 1934 that an officer's conduct and intent will be

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fair housing acts. The defendant argued that a race discrimination suit should be dismissed against him because his wife, who managed a housing business with him, had committed the discriminatory acts. Understandably enough, the court dismissed this defense. Since the defendant's wife obviously intended to benefit him in so acting, the decision has no application to this case.

The only decision that conceivably helps Hydrolevel is *Holloway* v. *Howerdd*, 536 F.2d 690 (6th Cir. 1976), cited by the Government at Gov't Br. 25, n.20. In a suit under Section 12(2) of the Securities Act of 1933, the court held that a brokerage firm was liable for fraudulent sales by a licensed agent. The discussion of agency principles appearing at 536 F.2d 695-96 is particularly confused; while the opinion first appears to hold that apparent authority is *not* a basis for liability since "[t]here was no proof that [the defendant] 'usually' engaged in the sale of unregistered stock," *id.* at 696, the opinion goes on to provide, without any citation of authority, that the defendant "had an affirmative obligation to prevent use of the prestige of its firm to defraud the investing public." *Id.* At any rate, the opinion does not even address the applicability of *Restatement* § 235 (discussed *infra* at pp. 15-17) and it is inconsistent with other securities decisions addressing the issue. *See* ASME Br. 26, n.

imputed to the corporation only "when the officer's fraudulent conduct was (1) in the course of his employment and (2) for the benefit of the corporation." *Id.* at 884.*

Finally, at the very end of its discussion of "apparent authority," Hydrolevel purports to discuss decisions applying the apparent authority theory to antitrust violations. H. Br. 39-40. None has the slightest bearing on this case. In *Continental Baking Co.* v. *United States,* 281 F.2d 137 (6th Cir. 1960), contrary to Hydrolevel's assertion, H. Br. 39, "intent to benefit" was not at issue, as the court assumed that the price fixing agreement was designed to "inure to the corporation's benefit," *id.* at 150; rather, in reversing, the court directed that on retrial the agents would bind their principals only "by reason of the knowledge of or acquiescence in their actions by their superiors [or if] their superiors had adopted or ratified such action." *Id.* at 151. Similarly in *United States* v. *Continental Group, Inc.,* 603 F.2d 444 (3rd Cir. 1979), *cert. denied,* 444 U.S. 1032 (1980), the vice-presidents and managers of corporate defendants entered into a horizontal price fixing agreement on behalf of their corporations. Noting that "the Government must prove that the defendants agreed to effectuate an illegal purpose," *id.* at 462, the court held that a purposeful conspiracy had been demonstrated. Unlike this case, in both *Continental Baking, supra,* and *Continental Group, supra,* there was and could be no claim that those who entered into the price fixing arrangements did so without any intent to benefit the corporation, since the only possible purpose of price fixing is to increase corporate profits. Furthermore, *Azalea Drive-In Theatre Inc.* v. *Sargoy,* 394 F. Supp. 568 (E.D. Va. 1975), *rev'd on other grounds sub nom. Azalea Drive-In*

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* As Hydrolevel points out, H. Br. 38, n. 31, there is disagreement among the Circuits on the question whether the "controlling person" provision of § 20(a) preempts or adds to traditional agency principles. *Cf. Marbury Management, Inc.* v. *Kohn,* 629 F.2d 705 (2d Cir.), *cert. denied sub nom. Wood Walker & Co.* v. *Marbury Management, Inc.,* 449 U.S. 1011 (1980). Among those Circuits applying agency principles, however, the courts clearly hold that an agent's intent to benefit his principal is necessary to bind him.

Theatre, Inc. v. *Hanft*, 540 F.2d 713 (4th Cir. 1976), also cited by Hydrolevel, did not rely upon agency principles to determine the sufficiency of the evidence of conspiracy; rather, the Court relied upon "the circumstantial evidence that the defendants were acting in concert," 394 F. Supp. at 577 (footnote omitted), to conclude that the defendants were engaged in a joint and collaborative scheme. Contrary to Hydrolevel's representation that *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F.2d 913 (2d Cir. 1951) is a "civil antitrust suit," the court's discussion of agency principles concerned an "action for rescission of a contract." *See id.* at 917. By contrast, those federal decisions addressing the sufficiency of the evidence tying a corporation to an antitrust conspiracy through the acts of its agents have, as demonstrated in ASME's brief at 24-27, in every instance required a demonstration of the agent's "purpose to benefit the corporation." *See United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co.* v. *United States*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978).*

More fundamentally, Hydrolevel and the Government do not provide a cohesive analysis demonstrating why the concept of apparent authority, which both the appellate panel and the *Restatement (Second) of Agency* (1958) [hereinafter "*Restatement*"] recognize as an exception to the normal rule of liability, should provide the standard for judging the sufficiency of the evidence tying an organization to an antitrust conspiracy. As ASME's brief has already explained, *see* ASME Br. 28-35, in certain limited areas, holding a principal strictly liable for the

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* Incredibly, the Government relies on these very decisions as support for the contrary proposition that a "purpose to benefit the corporation" is not required. *See* Gov't Br. 25. The relevant portions of each opinion are quoted in ASME Br. 24-25, and show that the Government's contrary reading is simply wishful thinking.

acts of its agents (even if those agents did not intend to benefit the principal) is justified because, as between an innocent third party and a principal who generally benefits from his agent's acts, it is appropriate to make the third party whole through the assets of the principal. All of the cases cited at H. Br. 38, n.31, as well as *Gleason* v. *Seaboard Air Line Railway Co., supra,* 278 U.S. 349, fall into this category. This reasoning, however, does not logically apply, and never has been applied, to antitrust conspiracy cases, for several obvious reasons. The crucial issue in a conspiracy case is whether there was "understanding," an "agreement," or a "meeting of the minds." *See* pp. 2-4, *supra.* For this reason, even if a plaintiff need not show the specific intent of the alleged antitrust conspirators to achieve the anticompetitive effects of their conduct, as Hydrolevel claims at H. Br. 24, it nonetheless must show that each participant intended to participate in the conspiracy in the first place.* It simply makes no sense to hold that ASME "intended" to conspire with M&M/ITT or Hartford or knew of their activities, when all that ASME did was fail to ferret out the secret activities of two of its thousands of volunteer members. Indeed, the lower federal courts have uniformly held that "inadequate supervision and lax control" of employees are not a sufficient basis to establish liability for "knowing or intentional misconduct" under federal regulatory statutes. *See, e.g., Marbury Management, Inc.* v. *Kohn,* 629 F.2d 705, 711 (2d Cir.), *cert. denied sub nom. Wood Walker & Co.* v. *Marbury Management, Inc.,* 449 U.S. 1011 (1980) (suit under Securities Exchange Act of 1934); *Edwards & Hanly* v. *Wells Fargo Securities Clearance Corp.,* 602 F.2d 478, 485 (2d Cir. 1979), *cert. denied,* 444 U.S. 1045 (1980) (same).**

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* This distinction was clearly emphasized by this Court in a case upon which Hydrolevel heavily relies, *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 443 n.20 (1978): "In a conspiracy, two different types of intent are generally required—*the basic intent to agree, which is necessary to establish the existence of the conspiracy,* and the more traditional intent to effectuate the object of the conspiracy." (emphasis added). *See also United States* v. *Continental Group, Inc., supra,* 603 F.2d at 462.

** The panel erroneously referred to James and Hardin as "two of ASME's highly placed volunteers," A-3, and both Hydrolevel and the

The apparent authority concept is particularly inappropriate when the issue is not upon whom to place the burden of making an innocent victim whole, but rather whether punitive or exemplary damages should be imposed as a deterrent against future misconduct. Contrary to Hydrolevel's claim that no court "has refused to hold a principal liable for the *conduct* (and general intent) of an apparent agent where punitive, or statutory double or treble damages were being sought by the injured party," H. Br. 40 at n.33 (emphasis in original), this Court has expressly held that a corporation is not liable for punitive or exemplary damages unless one of its principal officers—defined as "[t]he president and general manager, or, in his absence, the vice president in his place"—knew and approved of the agent's act. *Lake Shore & Michigan Southern Railway Co* v. *Prentice,* 147 U.S. 101, 114 (1893). In that case, a conductor of a railroad intentionally placed a passenger under arrest even though he knew that the passenger had committed no infraction. While agreeing that the railroad company was liable for actual damages caused by its agent, this Court held that it was not liable for punitive or exemplary damages. This is still a federal rule, *see Williams* v. *City of New York,* 508 F.2d 356, 360-61 (2d Cir. 1974), and has been applied in antitrust suits. *See, e.g., Haskell* v. *Perkins,* 28 F.2d 222, 223-24 (D.N.J. 1928), *rev'd on other grounds,* 31 F.2d 53 (3d Cir.), *cert. denied,* 279 U.S. 872 (1929) (relying on *Lake Shore Railway,* holds that treble damages suit may not be brought against an estate because treble damages are "exemplary and punitive"); *accord, Rogers* v. *Douglas Tobacco Board of Trade, Inc.,* 244 F.2d 471, 483 (5th Cir. 1957), *later op.,* 266 F.2d 636 (5th Cir.), *cert. denied,* 361 U.S. 833 (1959);

Government refer to them as "officers." *See, e.g.,* H. Br. 15; Gov't Br. 32 at n.26. Their highest positions in ASME were as volunteer chairmen of a subcommittee and as two of 25 members of the B-PV Committee, one of ASME's 66 "main committees." The subcommittees are the lowest tier of ASME's organizational structure, below ASME's officers (a president and 21 vice presidents), governing council, the executive committee, several policy boards, and the 66 "main committees."

Shires v. *Magnavox Co.*, 432 F. Supp. 231, 235 (E.D. Tenn. 1976).*

Finally, Hydrolevel makes a disjointed attempt to respond to ASME's showing that direct reliance by a plaintiff is a necessary prerequisite for imputing liability to a principal under a theory of "apparent authority." Hydrolevel begins by asserting that ASME "held them [James and Hardin] out to the world" as authoritative spokesmen concerning low water cut-offs. H. Br. 35. *Restatement* § 8, Comment a, expressly provides that apparent authority exists only with respect to those who believe or have reason to believe in the manifestation of authority; since Hydrolevel did not itself rely on the April 29 letter, it does not fall within this class. Similarly, *Restatement* § 27, Comment b, notes that the principal "cannot make a manifestation [of authority] 'to the world.'" *See also Restatement* § 159, Comment b (no "holding out to the world.").** Lastly, Hydrolevel seeks refuge in the provisions of *Restatement* § 265. *See* H. Br. 36 at n.29; *see also* Gov't Br. 23. As the commentary to that Section emphasizes, the concept that apparent authority may bind a principal even though the plaintiff did not himself

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* As the panel noted, *Restatement* § 217C similarly "restricts the imputation of liability for punitive damages." A-16, n.6. Since the *Restatement* then states, in Comment c, that the rule does "not apply to the interpretation of special statutes such as those giving treble damages, as to which no statement is made," the panel, as well as Hydrolevel, *see* H. Br. 40, n.33, apparently concluded that a broader test of agency liability is somehow appropriate under the antitrust laws. While the *Restatement* is silent on the issue of antitrust liability, its provision that "no statement is made" on the subject logically implies that a more narrow rule, rather than a broader rule, is appropriate. It is difficult to imagine more "punitive" sanctions than those imposed in antitrust conspiracy cases, where the defendant may be liable not only for three times the actual damages suffered by the plaintiff, but is liable for treble the damages caused by all co-conspirators as well.

** Hydrolevel also claims the ASME's reliance on Seavey, *Agency*, "confuses the concept of apparent authority with that of estoppel," H. Br. 36, n.29. In fact, Seavey states, at Section 8, p. 14, that "estoppel and apparent authority are alike in another respect. They *both* operate with respect only to those by whom the misleading manifestations are received." (emphasis added).

rely on that authority is limited to the specific torts there enumerated, specifically deceit "based upon misrepresentations," actions for physical harm "based upon an untrue representation of safety," or defamation. Not only do several of these torts require that the agent intend to benefit the principal, *see* ASME Br. 27-28, but they are admittedly exceptions to the general rules of agency and have no conceivable relevance to antitrust conspiracy cases.*

The illogic of the position advocated by Hydrolevel and the Government is emphasized when it is analyzed in the context of other antitrust decisions. For example, it is settled law that, while a corporation cannot normally conspire with its own employee for want of the requisite plurality, if the agent is motivated to an appreciable extent by an intent to benefit himself or a third party, he then acquires sufficient independence to be capable of conspiring with his employer. *See generally,* 16A Von Kalinowski, *Business Organizations, Antitrust Laws and Trade Regulation,* § 6.01[2] (1981); *H & B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co.* v. *Daily Reflector, Inc.,* 496 F.2d 391, 399-400 (4th Cir. 1974). Since James' and Hardin's acts in this case were concededly motivated by their "independent personal stake" in pleasing their true employers, M&M/ITT and Hartford, *see Greenville Publishing Co., supra,* 496 F.2d at 399, either James or Hardin was capable of conspiring with ASME. Logic and precedent suggest that if James or Hardin had sufficiently independent motivation to conspire with ASME, they could not *simultaneously and by the same act* cause ASME to conspire with them; otherwise, a single person acting alone could create a multi-party antitrust conspiracy. Yet, this is precisely the result actually reached in this case, where the panel affirmed the finding that ASME conspired with M&M/ITT and Hartford solely on the basis of acts by individuals whose only intent was to benefit those corporations.

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* In any event, as previously demonstrated, ASME Br. 29-30, there was no direct reliance in this case.

In sum, neither precedent nor logic supports the panel's ruling, as Hydrolevel and the Government implicitly admit by emphasizing issues the panel avoided rather than the one it decided.* The panel's decision should be reversed and, at a minimum, the case should be remanded for consideration under the appropriate standard.

B. Neither "Actual Authority" Nor "Ratification" Theories Support the Panel's Opinion.

The principal argument of both Hydrolevel's and the Government's briefs are that ASME was bound by James' and Hardin's acts under a theory of "actual authority," H. Br. 23-33; Gov't Br. 16-21, or that ASME somehow "ratified and affirmed" the anticompetitive conduct of Hardin and James. H. Br. 33-34. The Court of Appeals, of course, expressly declined to reach these issues, A-13, and the issues are thus not before the Court. Since neither the "actual authority" nor the "ratification" theory has the slightest support in the record, however, and since analysis of the law governing those questions further illustrates the panel's error in adopting an "apparent authority" standard, they will be briefly discussed here.

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* The Government's present contention that an intent to benefit the principal is unnecessary in antitrust cases is diametrically inconsistent with the position it has heretofore taken. In the formal text of remarks by the Assistant Attorney General in charge of the Antitrust Division, delivered on May 31, 1979, the principal spokesman for the Government on antitrust issues stated that a corporation is liable "for the acts of its employees and agents when those acts are undertaken for the benefit of the corporation. . . ." Shenefield, "Compliance Programs As Viewed From The Antitrust Division," *reprinted in* 1979 *Trade Reg. Rep.* ¶ 50,403, at p. 55,899. Similarly, in *United States* v. *Koppers Co.*, 652 F.2d 290 (2d Cir. 1981), the Government defended a jury charge that "a corporation is legally bound by the acts and statements of its agents done on behalf and to the benefit of the corporation and directly related to performance of the duties the employee has authority to perform." *Id.* at 298. In a brief signed by the Assistant Attorney General in charge of Antitrust Division, the Government stated that these were "familiar and established principles." *See United States* v. *Koppers Co.*, Dkt. No. 80-1362, Government's Brief at 25. The Government appears to have created the position set forth in its *amicus* brief uniquely for this case.

1. *Actual Authority.* The thrust of both the Government's and Hydrolevel's briefs is that under the principle of *respondeat superior,* governing the relationship of master and servant in tort actions, ASME should be liable for James' and Hardin's anticompetitive acts. While both Hydrolevel and the Government concede that this approach requires a showing that the agent intended to benefit the principal, *see* H. Br. 27; Gov't Br. 19, they argue that because James and Hardin each "performed the very function that was delegated to him under ASME's constitution and regulations," Gov't Br. 20 at n.15, the drafting and release of the April 1971 letter somehow served the interest of ASME. This analysis fundamentally misstates the law and is contrary to common sense.*

The principle of *respondeat superior* is that "a master is subject to liability for the torts of his servants committed *while acting in the scope of their employment.*" *See Restatement* § 219(1) (emphasis added). As the Comment to this Section states, the "conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant." *Id.* at Comment a. Precisely because the master cannot "control" the activities of an agent who actively intends to deceive him or attempts to misuse his authority for the benefit of another, Section 235 of the *Restatement* provides that a servant's act "is not within the scope of employment if it is done with no intention to perform it as a

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* Moreover, this analysis is unsupported by the facts. In connection with the issuance of the April 29, 1971 letter, James had no authority or responsibility in the code interpretation process, and his acts (drafting the "loaded" inquiry letter and contriving to obtain a response suitable for misuse by M&M/ITT) did not even purport to be under any color of authority of "ASME's constitution and regulations." Rather, James was acting secretly and behind the scenes, utilizing his knowledge of ASME's procedures to benefit his employer. Indeed, the panel's discussion of ASME's liability referred exclusively to Hardin's activities, *see* A-12 to A-19. Even here, the record is clear that he had no actual authority to issue a letter which addressed the acceptability under ASME standards of any proprietary device. *See* ASME Br. 6-7, 12 at n.; AX V. 191-92; App. 732-33.

part of or incident to a service on account of which he is employed."* Furthermore, the first Comment on this key provision expressly rejects the reasoning adopted Hydrolevel and the Government:

> "The rule stated in this Section applies although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and *although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material.*"

Restatement § 235, Comment a (emphasis added).** Merely because James and Hardin purported or outwardly appeared to be carrying out the duties of volunteer members in "responding" to M&M's staged request is thus irrelevant; the pertinent question is whether in so doing—that is, in secretly skewing the question and response to be useful for M&M's commerical purposes—they had any design to benefit ASME. The record is simply barren of any evidence that they had any

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* Section 235 thus emphasizes that an agent's intent to benefit his principal is a fundamental part of the doctrine of *respondeat superior.* The rhetorical assertion of both the Government, Gov't Br. 25-26, and Hydrolevel, H. Br. 41, that ASME is seeking "an exemption from traditional principles of *respondeat superior*" is thus backwards: ASME has simply tried to apply *respondeat superior* principles to this case; the panel's opinion—and Hydrolevel's new-found position in this Court—are based on an exception to those principles.

** *See also Restatement* § 231, Comment a, regarding "criminal or tortious acts," which provides:

> "The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do."

such intent.* Moreover, since ASME logically could not benefit from an improper interpretation of its own Code, there was no circumstantial basis for an inference that either James or Hardin had such a purpose. *See* ASME Br. 39-41. This is a case where "the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm," *Restatement* § 235, Comment c, for which the principal is not liable.**

Hydrolevel's further reliance on the theory that an agent can act for, and thus serve, two masters, *see* H. Br. 27, is similarly inapplicable. While *Restatement* § 226 states that an agent "may be the servant of two masters . . . if the service to one does not involve abandonment of the service to the other" and while Section 236 provides that an agent's conduct may be "actuated by dual purpose," the commentary and examples under these sections support ASME's position. The *Restatement* requires that if an agent simultaneously binds two masters, his acts must be "within the scope of his employment for both," *Restatement* § 226, Comment a, thus requiring, under Section 235, that he intend to benefit both. Furthermore, the

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* For this reason, the Government's heavy reliance, Gov't Br. 13-14, 18, on *New York Central & Hudson River R.R.* v. *United States*, 212 U.S. 481 (1909), is misplaced. *See also* H. Br. 27. In that case, which involved the constitutionality of imposition by the Elkins Act of liability on a common carrier for acts of its agents, this Court expressly noted that liability may be imputed to the principal "because the act is done for the benefit of the principal . . . ." (*id.* at 493) and that it is "the corporation, which profits by the transaction . . . ." *Id.* at 495; *see also* ASME Br. 33-35.

** Hydrolevel's discussion ignores Section 235, which compels reversal, and focuses on Section 282. H. Br. 28-31. This emphasis is misplaced. Section 282 deals with formal "notice" given to a principal through his agent. The introductory remark to the chapter is careful to note that intent to benefit the principal is unnecessary only "in the case of contracts and conveyances;" where the issue is the principal's liability in tort, "[t]he principal is not liable *unless the agent was authorized and intended to act in part, at least, for the principal's benefit, or unless the principal in some way benefited from the transaction.* For these reasons it is necessary to deal with the two situations separately." *Restatement* at p. 581 (emphasis added).

same Comment emphasizes that the agent cannot "be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other." The illustrations given thereafter—and particularly Illustration Number 3—show that the drafters of the *Restatement* did not mean to allow a dishonest agent to serve a true principal who benefits from an intentionally deceitful exercise of the agent's responsibilities, and at the same time to bind the principal who is thereby being deceived.

Similarly, Hydrolevel's attempts to rely on so-called "judicial admissions" by ASME that James and Hardin were acting on its behalf, H. Br. 31-32, *see also* Gov't Br. 20, n.15, amount to capitalizing on the thoroughness of James' and Hardin's deceit. The April 29, 1971 letter was issued by ASME in the normal course of its activities precisely because James and Hardin secretly and skillfully concocted a deliberately artificial request letter and a technically accurate response, *neither of which mentioned Hydrolevel in any way,* but which were ultimately designed to be misused by M&M for its own purposes. The fact that James and Hardin successfully manipulated ASME's procedures to accomplish their scheme is in itself no more relevant in determining ASME's knowledge and intent than if they had been bribed or coerced to do so, or if they had stolen ASME's stationery and issued the letter themselves: since they did not intend to benefit ASME, under normal principles of *respondeat superior* ASME is not liable for their acts.*

2. ***Ratification.*** Hydrolevel alternatively argues that ASME's acts after M&M's misuse of the April 29, 1971 letter was brought to its attention constituted a "ratification" or "approval" of James' and Hardin's anticompetitive acts. H. Br. 33-34. The Court of Appeals not only formally declined to resolve this question, *see* A-13, but expressly stated that

* Note, however, that under the Court of Appeals' "apparent authority" theory, if a member of a voluntary organization were bribed or coerced to commit an unlawful act, the organization would be bound if the act was within the scope of the member's "apparent authority."

ASME's participation in the alleged conspiracy—even under an erroneous "apparent authority" theory—ended with the issuance of the June 9, 1972 letter. A-23. Hydrolevel's argument has thus already been indirectly, but quite emphatically, rejected by the Court of Appeals.*

At any rate, Hydrolevel's arguments in support of its ratification theory are absurd. As ASME's statement of facts demonstrates, *see* ASME Br. 10-12, ASME's reaction to Hydrolevel's complaint about the April 29, 1971 letter was the antithesis of a "ratification," an "approval," or a "cover-up". Rather than hiding the event from public view, the entire matter was put on the agenda for the next meeting of the B-PV Committee, to which Hydrolevel was specifically invited, and was openly discussed at a public meeting attended by literally hundreds of mechanical engineers from all segments of the profession. Furthermore, the June 9, 1972 letter directly responded to Hydrolevel's request for a "correcting statement." J.A. 73. While Hydrolevel now claims that the June 9 letter was "vague and ambiguous," and "confirmed the intent of the entire earlier letter," H. Br. 34, this is simply not true, as the operative language of the June 9 letter emphasizes: "This will advise that there is no intent in Section 4 to prohibit the use of low water fuel cut-offs having time delays in order to meet the requirements of Par. H.G. 605(a)." J.A. 84. Hydrolevel's present quibbling over the wording of the letter is refuted by the written statement of its President, very shortly after the June 9, 1972 letter was issued, expressing total satisfaction with it, and conceding that the letter "clearly removes any objection against the use of time delays with low water fuel cut-offs." AX V. 78-79; *see also* A-24.**

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* Hydrolevel chides ASME for devoting "only four sentences" to the issue of ratification. H. Br. 33-34. Since the issue was not decided by the Court of Appeals, was indirectly rejected by it, and was not raised in ASME's petition, Hydrolevel's remark is nonsensical.

** Hydrolevel does not respond to ASME's demonstration, ASME Br. 12, that Hydrolevel could have sought further review of the June 9 letter, and chose not to do so.

Similarly, Hydrolevel's claims that ASME failed to disavow the acts of James or Hardin in 1971 or 1972, H. Br. 8-12, 33-34, and its assertion that ASME's investigation of the matter was somehow inadequate, H. Br. 12-14, 34; *see also* Gov't Br. 28, n.22, simply ignore the extent of James' duplicity. Until the time of his testimony under oath before the Senate Judiciary Committee in 1975, James hid from ASME and from everyone else the fact that he had participated in drafting the April 12, 1971 inquiry letter and that he had destroyed his copies of the drafts. It is small wonder—and certainly not a basis upon which to find ASME liable for antitrust damages caused by a letter issued three years earlier—that in 1974, at a time when James still hid from ASME and others the true nature of his role, ASME's Professional Practice Committee was unable to discover the true facts.* Hydrolevel's claim that the very success of James' duplicity somehow binds ASME makes no sense and has no support in law.

POINT II

THE COURT OF APPEALS ERRED IN UPHOLDING ANTITRUST LIABILITY ON THE BASIS OF NEGLIGENT "UNINTENTIONAL PARTICIPATION" IN AN ANTITRUST CONSPIRACY

As Point I of this brief emphasizes, a theory of "apparent authority" without requiring that the agent intends to benefit the principal does not appropriately apply to antitrust actions and cannot be used—as the Court of Appeals used it—as the exclusive basis upon which to link an otherwise unwitting organization with an antitrust conspiracy. In Point II of our main brief, we pointed out that the panel's holding in effect

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* Needless to say, ASME was also unaware until after litigation commenced of M&M/ITT's internal files detailing the company's appreciation of James' anticompetitive acts. *See* H. Br. 2-3; Gov't Br. 5. This evidence and other evidence like it showing the deceitfulness of James and his employer are obviously irrelevant in assessing *ASME's* knowledge or intent, the only issue in this case.

eliminated the requirement, long recognized by this Court, *see* ASME Br. 36-38, that a defendant must have been an active and knowing participant in a conspiracy in order for it to be liable under the antitrust laws. Acknowledging that its holding amounted to finding ASME liable for "unintentional participation" in the conspiracy, A-26, the panel's opinion, in essence, embraced a theory of negligence based on ASME's alleged failure to supervise the acts of its members.

Neither Hydrolevel nor the Government addresses or responds to Point II of our brief. Nonetheless, the Government does claim that a "careful and objective check by another Subcommittee member familiar with the relevant provision of the Code would have revealed the deliberate error introduced in the draft response by Hardin and James." Gov't Br. 28. From this, the Government argues that agency principles should be so construed that "imposition of liability on code-making bodies such as ASME . . . will encourage the adoption of procedural safeguards to prevent such abuses." *Id.* at 26-27. The Government thus candidly acknowledges that the ultimate rationale of the panel's opinion is a negligence theory. As this Court has recently held, however, when Congress intended to premise liability on negligence, "it said so expressly and subjected such actions to procedural restraints . . ." *Aaron* v. *Securities and Exchange Commission,* 446 U.S. 680, 690 (1980), *see also Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 206-07 (1976).*

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* The Government's argument that "a careful and objective check" of the April 29, 1971 letter would have revealed James' and Hardin's scheme, Gov't Br. 28, is also blind to the facts. The April 29, 1971 letter was pernicious precisely because it was a technically accurate response to the extremely limited—and secretly contrived—question to which it responded. *See* ASME Br. 8, 37, n. If a low-water fuel cut-off operated after the water fell below the required point, the cut-off would not meet the Code, which clearly (and with good reason) requires that a cut-off operate before the water falls below the danger point. Since M&M's "loaded" question was couched in terms of a cut-off that operated *after* the danger point had been passed, the response that such a cut-off would be inadequate was in itself correct, and no "objective check" of the response—which, like the question, did not mention or refer to Hydrolevel in any way—could have foreseen the

In any event, since the extent of ASME's negligence was at most its failure to monitor volunteer personnel, for reasons already discussed, *see* pp. 2-4, 10, 13, *supra*, this omission cannot be the basis for "knowing or intentional misconduct." Accordingly, the panel's legal conclusion that ASME is liable for negligent or "unintentional participation" in an antitrust conspiracy should be reversed and, for the reasons demonstrated in Point II of ASME's main brief, the complaint should be dismissed.

POINT III

THE PANEL'S DECISION IS ALSO WRONG AS A MATTER OF POLICY AND WILL HAVE A DISASTROUS EFFECT ON MANY VOLUNTARY ORGANIZATIONS WHICH SERVICE THE PUBLIC INTEREST

In the final portion of their briefs, Hydrolevel and the Government argue that the policies underlying the antitrust laws require that this Court affirm the decision of the Court of Appeals. These policy arguments misconstrue ASME's arguments and the facts of this case, and should be rejected.

Hydrolevel and the Government begin by asserting that ASME seeks "immunity" (*see, e.g.*, H. Br. 44; Gov't Br. 26, 27, n.21) from the antitrust laws or an "exemption" (H. Br. 41, 44, 48-49; Gov't Br. 25-26, 30, n.25) from the principles of *respondeat superior*. This is simply not so. As expressly stated in ASME's principal brief, at 46 (footnote omitted):

> "We do not argue that non-profit, voluntary associations, such as ASME should be immune from antitrust liability;

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misuse to which the secret conspirators would put the letter. Furthermore, as also demonstrated at ASME Br. 37, n., there *was* an "objective check" of the letter by both the Chairman and the Vice-Chairman of the B-PV committee, two individuals having nothing to do with M&M or Hartford and whom Hydrolevel has never claimed to be part of the alleged conspiracy. They obviously did not and could not see the evil hidden in the letter because the letter was capable of ill effect only when subsequently misused by M&M. *See* ASME Br. 9-10.

> we suggest only that holding such an organization strictly liable in treble damages for the unauthorized and unratified acts of volunteer members, that are not taken in furtherance of the organization's objectives or otherwise to benefit the organization, is unprecedented as a matter of law and unwise as a matter of policy."

Moreover, rather than seeking "an exception from the traditional principles of *respondeat superior*" (Gov't Br. 25-26; *see also* H. Br. 41), the thrust of our argument has been that *respondeat superior* (which includes the requirement of an intent to benefit the principal) should govern this case and requires reversal. It is the panel, not ASME, that rejected "the appropriate theory for conventional torts," A-13, and reached out, without the benefit of any briefing on the question, for an exceptional theory of vicarious liability that amounts to holding a voluntary organization strictly liable for the acts of any of its members provided only that the member acted within the broad scope of his "apparent authority."

In part, the Government's position arises from its inaccurate understanding of the facts in this case.* More importantly, however, the Government fundamentally misperceives how ASME (or any voluntary standards organization) works. *See*

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* Contrary to the panel's conclusion that James and Hardin were able "to rule dispositively on the fitness of a competitor's product," A-16, *see, e.g.*, Gov't Br. 26, the April 29 letter did not even mention Hydrolevel or its device. To the extent that the letter had any adverse effects on Hydrolevel's fortunes, this was solely because M&M (concededly without ASME's knowledge) misrepresented the letter as barring Hydrolevel's product. Furthermore, the Government's claim that ASME issued the letter "without providing procedures to ensure accuracy and fairness," Gov't Br. 32, n.26, *see also id.* at 28, is also mistaken. As previously demonstrated, *see* ASME Br. 8-12, 37, n.*, and pp. 19, 21-22, n., *supra*, the letter was reviewed by two committeemen having no relationship to Hydrolevel or its competitors; as soon as Hydrolevel complained of the letter, it was discussed at a public meeting to which Hydrolevel was invited; ASME thereafter issued a letter specifically stating that a time delay feature did not violate ASME's Code; and Hydrolevel expressly acknowledged its satisfaction with the June 9 letter.

generally Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Standards Affecting Safety or Health," 56 *Texas L. Rev.* 1329-1484 (1978), for a detailed discussion of voluntary standards organizations. For example, the Government argues that affirmance is necessary because ASME "otherwise would wield essentially legislative powers without check by public authority. . . ." Gov't Br. 31.* This is simply wrong. As set forth in our main brief, pp. 2-3, ASME's many codes are voluntary; that is, they have no independent force or effect, do not bind any manufacturer or distributor, and are purely advisory in nature. What gives them economic vitality is the fact that numerous regulatory jurisdictions, including the federal government, have determined to adopt ASME's codes as part of *their* regulatory framework.** This is quite different from the situation where a group of private business concerns jointly determine to boycott a particular product because it does not meet their self-imposed standards of quality. *Compare Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963). Contrary to the Government's assertion, the "public authorities" have every opportunity to "check" the appropriateness of ASME's codes and the fitness of ASME's procedures and are under no obligation to adopt or continue to use the codes if they are dissatisfied with them.***

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* Similarly, Hydrolevel mistakenly argues that organizations like ASME "exercise regulatory power over a client industry," H. Br. 46, and even includes in its Point III caption the hyperbolic claim that this case involves "Private Groups That Exercise Unregulated Power Over The Economic Freedom of Others . . . ." H. Br. 41.

** In fact, the federal government not only adopts and enforces ASME codes as federal regulations, but participates in ASME's codes and standards activities by authorizing government employees to serve on ASME committees; indeed, the federal government has expressly requested that ASME develop new codes to cover areas perceived to need such safety standards. *See, e.g.*, App. 613-22.

*** In addition, the Government's heavy reliance on *Radiant Burners* and *Silver* (Gov't Br. 31, n.26, 32, n.27), ignores the procedural safeguards

ASME's codes enjoy widespread recognition precisely because the federal government and many state and local governments have approved both its standards and the procedures used in adopting them. But for the activities of ASME and similar voluntary standards organizations (many of which have filed *amicus* briefs herein), these governmental entities would themselves be required to develop and coordinate among themselves uniform standards for industry and commerce, all at enormous additional public expense and bureaucratic complexity.* *See* ASME Br. 43-44. It is clear, therefore, that these organizations perform vital functions in the public interest, and we strenuously question the view that responsible antitrust policy requires that such organizations be held liable for three times the damages caused by each of their alleged co-conspirators where the sole basis of their "participation" in a conspiracy is the secret and disloyal acts of a member whose only interest was to benefit himself or another.

As the Government recognizes, the purpose of the treble damage remedy is to "deter violators." Gov't Br. 29. In the context of an antitrust conspiracy, a violator is one who

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that ASME maintained at the time of the issuance of the letter in question, including: (1) full B-PV Committee review and approval of any "official" decision; (2) procedures against the issuance of any interpretation addressing the acceptability of a particular device or design, which instead were referred to an umbrella group of governmental regulatory authorities responsible for enforcing the Code for a response; and (3) "due process" appeal procedures. *See* ASME Br. 6-7, 10-12. Furthermore, such procedural safeguards have undergone continual tightening and improvement over the past decade. However, the point here is that no set of safeguards can insure that a non-profit, voluntary membership organization will not be victimized by a disloyal member familiar with its procedures or, for that matter, under the panel's standard, by a volunteer possessing a piece of official stationery and the guile to misuse it with an outward appearance of authority. *See* ASME Br. 45-46.

* Interestingly, if federal or state governmental agencies were to fulfill these functions directly instead of relying on organizations like ASME, standards-setting activities would be immune from accountability under the antitrust laws. *Cf. Parker* v. *Brown*, 317 U.S. 341 (1943).

intentionally participates in an agreement or combination with knowledge of at least some of the conspiracy's illicit goals. *See* pp. 2-4, 10 at n., 20-22, *supra*. Hydrolevel plainly named M&M/ITT and Hartford as defendants in this suit on the theory that James and Hardin were serving M&M/ITT and Hartford and that their actions made those companies "violators" of the antitrust laws. Since James and Hardin intended to benefit their employers, those companies—which have settled the antitrust allegations against them—were obviously bound by their acts. Neither Hydrolevel nor the Government, however, has provided a rational basis for their assertion that James' and Hardin's acts also establish ASME's knowledge and conspiratorial intent.

It is not enough simply to argue that punitive measures are necessary as incentives to encourage more thorough monitoring or better procedures; this may justify the imposition of ordinary tort liability upon a negligent defendant,* but it has no bearing on determining whether there was intentional misconduct. Nor is it relevant that in this instance an employee of a competitor of Hydrolevel was in a position to manipulate ASME's procedures, unless the record demonstrates that ASME intentionally placed him in such a position for that purpose. As emphasized in ASME's main brief, this Court and the federal courts have long tolerated, and even encouraged, joint action among competitors in true trade associations, unless the facts show that the intent or purpose of the combination was to restrain trade. ASME Br. 40-41. ASME is not

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* The panel in this case concluded that Hydrolevel could successfully have sued ASME for common law and statutory torts. A-15, n.5. As the panel also noted, Hydrolevel initially included such allegations in its complaint against ASME but "abandoned all of its state law claims at trial." *Id.* Hydrolevel's assertion that it will be remediless if the judgment against ASME is not upheld, H. Br. 49, thus ignores the facts that it settled its suit against the only organizations that benefited from the wrongdoing and that it deliberately chose to base all of its claims against ASME on antitrust allegations, foresaking tort remedies in the hope of a treble damage recovery.

even a trade association,* and there is nothing in the record to even suggest that its purpose or intent in placing James and Hardin on the Section IV Subcommittee was to enable them to launch anticompetitive schemes against competitors of their respective employers. Rather, everything in the record suggests that, other than James and Hardin, no one associated with ASME had any knowledge whatsoever of their nefarious scheme until many months after it was in motion.

Hydrolevel attempts to distort these facts by quoting selectively and at length from Bruce Sinclair's *A Centennial History of the American Society of Mechanical Engineers, 1880-1980* (Univ. of Toronto Press 1980). H. Br. 42-44. While Hydrolevel notes at the outset of this discussion that *"Centennial* chronicles how, *in its early years,* the ASME had been dominated by a small group . . .," H. Br. 42 (emphasis added), it later attempts to apply the *Centennial* history "to the present." H. Br. 43. This ignores not only the clear pre-World War II context of the cited portions of *Centennial,* but the documented fact the procedures of voluntary standardization changed markedly after World War II, *see* Hamilton, *supra,* 56 *Texas L. Rev.* at 1369-71, when "the principal standards-setting organizations took steps designed to broaden the interests represented in the standards-setting process," *id.* at 1370, and American National Standards "due process" procedures were adopted by standards writing organizations. *Id.* at 1346; *see generally id.* at 1341-49.**

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* While some of its individual members come from the manufacturing sector, the rest come from academia, other scientific institutions, insurers, consumer groups and federal and state regulatory agencies. *See* ASME Br. 3.

** Hydrolevel also argues that "only the 'major firms' with an interest in the Code could afford to donate large amounts of engineering talent to code development work." H. Br. 43-44. This is not only contrary to the fact that, much as in bar association work, engineers from all segments of the profession donate their time to professional association activities, but conveniently ignores the uncontroverted evidence in this case that an employee of Hydrolevel, a firm that "never at any time reached 1% of the market," A-22, served as a member of an ASME Committee with oversight responsibility for the low-water cut-off safety device here at issue. *See* App. 651-54.

If ASME is liable for treble damages solely because two of its many thousands of members were able in this instance to secretly manipulate its procedures, every public interest membership association in the country will be vulnerable to such suits and, in the rare but inevitable instances where such deceit is successful, to astronomical money judgments. At a time when the Government is cutting back on its activities and urging greater reliance on the voluntary sector, the ultimate loser would be the public.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint dismissed; at a minimum, the case should be remanded for reconsideration under the proper standards.

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Respectfully submitted,

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